No. 12,844

IN THE

United States Court of Appeals

For the Ninth Circuit

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY (a corporation),
Appellant,

vs.

H. V. CARTER CO., INC. (a corporation),
Appellee.

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

REPLY BRIEF FOR APPELLANT.

SAMUEL S. STEVENS,
F. WHITNEY TENNEY,
EUGENE S. CLIFFORD,
HELLER, EHRMAN, WHITE & MCAULIFFE,
14 Montgomery Street, San Francisco 4, California,
Attorneys for Appellant.

Subject Index

I. Page

Jurisdiction of Gravely was not obtained by service of process on the manager of its subsidiary, Pacific 1

A. Neither Pacific nor Heinen, its manager, was an agent of Gravely 1

B. Gravely at no time has transacted business in California 4

II.

There was no acceptance by Gravely of the orders of Carter for 122 tractors 8

A. Neither Gravely nor Pacific acknowledged the order of July 3, 1945 for 45 tractors 8

B. Gravely's acknowledgments of the remaining orders for 77 tractors were definitely qualified 9

C. Appellee's authorities on the contractual issue are distinguishable from the instant case 9

Table of Authorities Cited

	Pages
Cannon Mfg. Co. v. Cudahy Packing Co. (1924), 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634	3
Cohen v. Boulevard Frocks, Inc. (1938), 26 F. Supp. 771	6
Consolidated Textile Corp. v. Gregory (1933), 289 U.S. 85, 53 S. Ct. 529, 77 L.Ed. 1047	4
Cutler v. Cutler Hammer Mfg. Co. (1920), 266 F. 388	3, 4
Erskine v. Chevrolet Motor Company (1923), 185 N.C. 479, 117 S.E. 706	10
Gantner & Mattern Co. v. Hawkins (1949), 89 Cal. App. (2d) 783, 201 Pac. (2d) 847	10, 11
Garber v. Bancamerica-Blair Corp. (1939), 205 Minn. 275, 285 N.W. 723	4
General Acc., Fire & Life Assur. Corp., Ltd., of Perth, Scotland v. Goodyear Tire & Rubber Co. (1940), 25 N.Y.S. (2d) 68	2
Guile v. Sea Island Co. (1947), 66 N.Y.S. (2d) 467	5
Hedrick v. Canadian Pac. Ry. Co. (1939), 28 F. Supp. 257	6
Industrial Research Corp. v. General Motors (1928), 29 F. (2d) 623	3
International Shoe Co. v. State of Washington (1945). 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95	6, 7
Littman v. Morris B. Sachs (1946), 65 N.Y.S. (2d) 753	3
Majestic Co. v. Orpheum Circuit, Inc. (1927), 21 F. (2d) 720	3, 4
Parke v. Frank (1888), 75 Cal. 364, 17 Pac. 427	10
Pergament v. Frazer (1949), 93 F. Supp. 9	5
Peterson v. Chicago R. I. & P. R.R. (1906), 205 U.S. 364, 27 S.Ct. 513, 51 L.Ed. 841	3
Sales Affiliates, Inc. v. Superior Court (1950), 96 Cal. App. (2d) 134, 214 P. (2d) 541	5, 6

Page

Schenstrom v. Continental Machines (1947), 7 F.R.D. 434 2
State ex rel. New York Oil Co. v. Superior Court (1927), 143 Wash. 641, 255 P. 1030 3
Stephany v. Hunt Bros. Co. (1923), 62 Cal. App. 638, 217 Pac. 797 11

Taylor v. Enoch Morgan's Sons Co. (1891), 124 N.Y. 184, 26 N.E. 314 10
Taylor Manufacturing Co. v. Hatcher Manufacturing Co. (1889), 39 Fed. 440 10
Thew Shovel Co. v. Superior Court (1939), 35 Cal. App. (2d) 183, 95 P. (2d) 149 5

Watson v. Oregon Moline Plow Co. (1924), 112 Ore. 414, 227 Pac. 278 10
White Company v. W. P. Farley & Company (1927), 219 Ky. 66, 292 S.W. 472 10

Zinn v. Ex-Cell-O Corp. (1944), 24 Cal. (2d) 290, 149 Pac. (2d) 177 10

No. 12,844

IN THE

United States Court of Appeals

For the Ninth Circuit

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY (a corporation),
Appellant,

vs.

H. V. CARTER CO., INC. (a corporation),
Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

REPLY BRIEF FOR APPELLANT.

I.

JURISDICTION OF GRAVELY WAS NOT OBTAINED BY SERVICE OF PROCESS ON THE MANAGER OF ITS SUBSIDIARY, PACIFIC.

A. Neither Pacific nor Heinen, its manager, was an agent of Gravely.

Appellant does not contend that the service of process on Heinen was defective because of his position with Pacific, or, in the language of the cases, that he lacked "sufficient dignity". Its position in this respect is that the service of process on Heinen was

defective because neither he nor Pacific, his employer, was an agent of Gravely.

There is no evidence in this case to support appellee's assumption that Pacific was the agent of Gravely so as to make the latter amenable to service of process through service on Pacific. The functions of Pacific as a distributor for Gravely were no more indicative of an agency relationship than was the exercise of similar functions by Carter when it acted as an exclusive distributor for Gravely in this area prior to Pacific's incorporation. Gravely's transactions with Carter and subsequently with Pacific were merely sales in interstate commerce, or, to put it more simply, created the status of buyer and seller.

The fact that the seller is a parent corporation and the buyer its subsidiary does not alter the actualities of the situation. The court said in *General Acc., Fire & Life Assur. Corp., Ltd., of Perth, Scotland v. Goodyear Tire & Rubber Co.* (1940), 25 N.Y.S. (2d) 68, 70:

> "The mere fact that a wholly owned corporation sells products of the owner does not make it the agent of the latter so as to permit service of process upon it."

See also:

Schenstrom v. Continental Machines (1947), 7 F.R.D. 434.

It is similarly well settled that the subsidiary corporation does not become the agent of the parent merely because of ownership of the subsidiary's stock

by the parent, or because the same officers serve both companies.

Peterson v. Chicago R. I. & P. R.R. (1906), 205 U.S. 364, 27 S.Ct. 513, 51 L. Ed. 841.

Appellee's efforts to distinguish the instant case from the facts of *Cannon Mfg. Co. v. Cudahy Packing Co.* (1924), 267 U.S. 333, 45 S. Ct. 250, 69 L. Ed. 634, are abortive since that decision clearly holds that marketing of the parent corporation's products by the subsidiary does not create an agency relationship.

The facts in the present case and those in *Littman v. Morris B. Sachs* (1946), 65 N.Y.S. (2d) 753; *State ex rel. New York Oil Co. v. Superior Court* (1927), 143 Wash. 641, 255 P. 1030; *Industrial Research Corp. v. General Motors* (1928), 29 F. (2d) 623; *Cutler v. Cutler Hammer Mfg. Co.* (1920), 266 F. 388; and *Majestic Co. v. Orpheum Circuit, Inc.* (1927), 21 F. (2d) 720, are quite dissimilar. In *Littman v. Morris B. Sachs* (supra), the facts do not indicate the actual corporate separation that exists in the case at bar. The facts of *New York Oil Co. v. Superior Court* (supra) show that the parent was the operating corporation and that the subsidiary was a complete dummy, existing in name only and without any actual corporate existence.

Industrial Research Corp. v. General Motors (supra), discussed by appellant in its opening brief, distinguishes itself from the instant case and the *Cannon* case at page 626 by the following language:

> "In the case considered by the Supreme Court (referring to *Cannon v. Cudahy*) there was no attempt to hold the moving defendant liable for an act or omission of its subsidiary, and for that reason alone cases concerning substantive rights such as those cited in the opinion of the Supreme Court are not applicable." (Reference added.)

In *Cutler v. Cutler Hammer Mfg. Co.* (supra) no formal corporate separation existed and, of course, this case was decided prior to *Cannon v. Cudahy* (supra). *Majestic Co. v. Orpheum Circuit, Inc.* (supra) is inapplicable and, if anything, tends to support the position of Gravely.

B. Gravely at no time has transacted business in California.

Carter refers to many cases defining "doing business" by a foreign corporation. However, the cited authorities do not deviate from the fundamental proposition that a foreign corporation is not deemed to be conducting business in a state, so as to subject itself to service of process, because it markets its products through a subsidiary.

Consolidated Textile Corp. v. Gregory (1933), 289 U.S. 85, 53 S. Ct. 529, 77 L. Ed. 1047.

The facts in *Garber v. Bancamerica-Blair Corp.* (1939), 205 Minn. 275, 285 N.W. 723, are analogous to the facts in the instant case. At page 727 the court said:

> "Where, however, the corporate separation is maintained and the subsidiary conducts it own

> business, the subsidiary, not the parent, is doing the business. In that situation the foreign parent cannot be said to be doing business in the state."

In the instant case, Pacific was doing business in California, but not Gravely. That Hall from time to time communicated with Heinen does not alter the case. Hall was the president of Pacific, as well as president of Gravely, and the activities carried on by Pacific at the behest of Hall were the normal activities of the distributor, and obviously were not a transaction of business by the parent corporation.

Appellee, in its brief, assigns Exhibit DD as evidence that Gravely was doing business in this state. It is readily apparent that the agents referred to in that exhibit were those firms and individuals situated in the same circumstances as Carter, i.e., those to whom Pacific might sell equipment. In *Guile v. Sea Island Co.* (1947), 66 N.Y.S. (2d) 467, at page 469, the court said:

> "The fact that the defendant employed the words 'New York Office' in its literature is no evidence that it was in fact 'doing business' at that office."

Thew Shovel Co. v. Superior Court (1939), 35 C.A. (2d) 183, 95 P. (2d) 149; *Sales Affiliates, Inc. v. Superior Court* (1950), 96 C.A. (2d) 134, 214 P. (2d) 541, and *Pergament v. Frazer* (1949), 93 F. Supp. 9, cases upon which Carter relies heavily, are readily distinguishable from the case at bar. In *Thew Shovel Co. v. Superior Court* (supra) the manufacturer reserved the right to make sales to customers of cer-

tain classes without paying discounts or commissions to the distributors, title to consigned goods was retained by the manufacturer and contracts for the resale and notes on account of deferred payments were assigned to and accepted by the manufacturer; and installation service was provided and other activities performed by it. When the activities of Thew Shovel Co. are contrasted with those of Gravely, there is an obvious distinction. The activities which Thew Shovel Co. carried on are the functions that Gravely expected of Pacific.

To the same effect is *Sales Affiliates, Inc. v. Superior Court* (supra). Therein agreements and counter-agreements are found between the foreign corporation and distribution outlets, on both the wholesale and retail level. Sales Affiliates' persistent operation on the retail level completely distinguishes its activities from that of Gravely. The opinion in *Pergament v. Frazer* (supra) candidly discloses that it is colored by the broad Michigan statute.

The remaining authorities cited by Carter turn on the decision rendered in *International Shoe Co. v. State of Washington* (1945), 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95. This case reviews the subject of "doing business" for jurisdictional purposes, which, incidentally, calls for the exercise of independent judgment by the Federal Court, both in actions originally commenced therein and in actions removed thereto. See *Hedrick v. Canadian Pac. Ry. Co.* (1939), 28 F. Supp. 257; *Cohen v. Boulevard Frocks, Inc.* (1938), 26 F. Supp. 771. The facts of *Interna-*

tional Shoe Co. v. State of Washington (supra), demonstrate its complete inapplicability to the case at bar. International Shoe Company employed eleven to thirteen salesmen in the State of Washington. These salesmen were under the direct supervision and control of International Shoe Company's home office in St. Louis, they resided in Washington, confined their activities to that state, and were compensated by commissions based on sales made in that state. In addition to the foregoing, the salesmen from time to time rented office space in the state of Washington for which they were reimbursed by International Shoe Company. In addition to the dissimilarity of facts, the issues in the *International Shoe Company* case were quite different. Therein the court was considering a tax matter and also passing on the ability of the state to define for its own purpose what constituted doing business.

Appellant respectfully submits that it was not doing business in this state either through its own activity or the activities of its subsidiary, Pacific; that the relationship of principal and agent does not exist between Gravely and Pacific, and that, therefore, the attempted service of process in this case must be held invalid.

II.

THERE WAS NO ACCEPTANCE BY GRAVELY OF THE ORDERS OF CARTER FOR 122 TRACTORS.

A. Neither Gravely nor Pacific acknowledged the order of July 3, 1945 for 45 tractors.

Appellant is unable to agree with appellee in its statement that "It is admitted that Carter placed with Gravely orders for 122 tractors between the years 1943 and 1946". It is undisputed, however, that prior to the incorporation of Pacific in 1945, Carter placed with Gravely orders for 77 tractors, i.e., the 47 orders for ultimate purchasers and the group order of June 28, 1943, for 30 tractors. (Exh. FF.) Subsequent to 1945, Carter's dealings were primarily with Pacific, the distributor of Gravely products in California and other western states, from whom it was endeavoring to obtain an exclusive agency contract. The only tractors which could have been and which were received by Carter after the year 1945, were purchased from and delivered by Pacific. (R. 141.) On July 3, 1945, Carter placed with Pacific the group order for 45 tractors (Exh. X), which was accompanied by the proposed agency agreement signed by Carter but which was never executed by Pacific. It is admitted that an information copy of this order was sent by Carter to Gravely but no acknowledgment whatsoever was made by either Pacific or Gravely of its receipt.

The trial court in its first decision found "That on July 3, 1946, plaintiff placed an order with 'Pacific' for 45 tractors (Exh. X in evidence); that said order for 45 tractors was never acknowledged or accepted by 'Pacific'." (R. 62.) This finding does not ap-

pear in the second and final decision of the trial court. In both decisions judgment was ordered in favor of Pacific. The final decision of the trial court is therefore obviously inconsistent since there having been no acceptance or acknowledgment by Pacific of this group order for 45 tractors, similarly there was no acceptance or acknowledgment thereby by Gravely.

B. Gravely's acknowledgments of the remaining orders for 77 tractors were definitely qualified.

Appellee's reference to the form acknowledgments (Exh. HH, I) and the testimony of D. Ray Hall, president of Gravely and also Pacific, clearly indicate that the orders for the 77 tractors placed with Gravely if accepted at all, were accepted with definite qualifications. In the acknowledgments sent to the 47 ultimate purchasers Gravely stated definitely that "Due to Government restrictions we cannot guarantee delivery of the equipment on your order * * * We cannot recognize any promised or implied time of delivery * * *" The acknowledgment by Gravely of the group order of June 28, 1943, for 30 tractors advised Carter that "But, at any rate, we would appreciate the order and will hold it until such a time as we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment * * *" (Exh. FF reverse side.)

C. Appellee's authorities on the contractual issue are distinguishable from the instant case.

An examination of the decisions cited by appellee discloses that they are not in point on the contractual question involved in the instant case. Appellant ob-

viously cannot quarrel with the rule laid down by cases such as

Taylor Manufacturing Co. v. Hatcher Manufacturing Co. (1889), 39 Fed. 440,

and

Gantner & Mattern Co. v. Hawkins (1949), 89 Cal. App. (2d) 783, 201 Pac. (2d) 847,

cited by the trial court in its final decision, that a principal cannot deprive his agent under a selling contract of commissions on goods ordered through the agent by discharging him before the orders were filled. To the same effect are

Zinn v. Ex-Cell-O Corp. (1944), 24 Cal. (2d) 290, 149 Pac. (2d) 177;

Taylor v. Enoch Morgan's Sons Co. (1891), 124 N.Y. 184, 26 N.E. 314;

White Company v. W. P. Farley & Company (1927), 219 Ky. 66, 292 S.W. 472;

Erskine v. Chevrolet Motor Company (1923), 185 N.C. 479, 117 S.E. 706;

Watson v. Oregon Moline Plow Co. (1924), 112 Ore. 414, 227 Pac. 278;

Parke v. Frank (1888), 75 Cal. 364, 17 Pac. 427.

In *Taylor Manufacturing Co. v. Hatcher Manufacturing Co.* (supra) there was a written exclusive contract whereby defendant became the agent of plaintiff for the purpose of selling engines in a large number of counties in Georgia. In affirming a judgment on the cross-bill of defendant, the court at page 449 said:

> "The Taylor Company appealed to the court for an exercise of its equitable powers in their behalf—they must themselves do equity. They must pay the Hatcher Company for their expenses legitimately incurred. *They must pay the [the] profits which the Hatcher Company would have made by the engines they promised to deliver and which were refused.*" (Emphasis added.)

Gantner & Mattern Co. v. Hawkins (supra) was a case involving an oral contract under which Hawkins was employed as a salesman in the southern part of the United States upon a commission basis on goods actually delivered. After a dispute had arisen, Hawkins advised Gantner & Mattern Co. that he was resigning from their employment and he was thereupon informed that he would not be paid commissions on any articles thereafter shipped into his territory on orders already obtained by him. He then refused to resign and was discharged. At page 788 (89 Cal. App. (2d) 783) the court said:

> "It is the general rule that a principal cannot deprive his agent of commissions on goods ordered through him by discharging him before the orders are filled."

Stephany v. Hunt Bros. Co. (1923), 62 Cal. App. 638, 217 Pac. 797, is entirely inapplicable to the contractual issue in the present case.

It is undisputed that there was no contract employing Carter as an agent or distributor of either Gravely or Pacific. During the years when the orders for the

122 tractors were placed with Gravely and Pacific, Carter was, therefore, a non-exclusive dealer of Gravely products and its profits resulted from discounts allowed on orders for tractors which were accepted. The instant case is not one involving an agency contract or commissions earned by an agent. The question before this court is relatively simple, to-wit: was there an unqualified and unequivocal acceptance by Gravely or Pacific of Carter's orders. The undisputed evidence clearly shows that this fundamental legal requirement is lacking.

CONCLUSION.

Appellant Gravely respectfully prays that the judgment of the trial court be reversed.

Dated, San Francisco, California,
July 5, 1951.

Respectfully submitted,
SAMUEL S. STEVENS,
F. WHITNEY TENNEY,
EUGENE S. CLIFFORD,
HELLER, EHRMAN, WHITE & MCAULIFFE,
Attorneys for Appellant.